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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-596

No. A-264

EMIL F. ADAMS, ET AL,
*Petitioner*

*vs.*

EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, ET AL.,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.*

The Petitioner Emil F. Adams, et al. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 21, 1972.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Southern District of Indiana also appears in the Appendix hereto. A motion to stay was filed and denied, by this court on September 1, 1972.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 21, 1972, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

For at least the last fifteen years, defendant has operated a unitary school system. Now, defendant proposes to racially discriminate in pupil assignment. Astonishing as it may be, an examination of the minutes, records and actions of defendant board since 1949 will fail to include one charge of "de jure" segregation by any interested party, but to the contrary, there is 100% unanimity, by all concerned, on the fact that such segregation that exists in defendant school system is "defacto" only. (See plaintiffs Exhibit 8 and defendants Exhibit D introduced at trial and a part of the certified record herein). H.E.W. first instituted the charge of "de jure" segregation in one of the 37 elementary schools operated by defendant namely, Lincoln elementary school. It is against this factual background that the following questions are presented:

1. Do the guarantees of the Fourteenth Amendment apply equally to all children, regardless of race, within a given school district?

2. Does the Fourteenth Amendment prohibit a school board from using race as a basis for pupil assignment?

3. Is the non-discriminatory neighborhood school no longer an acceptable institution within the educational system of the United States of America?

4. Is racial balance to become the law of the land and the stated objective of the federal government?

5. Does a school board have a duty to eliminate defacto segregation?

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title 28 U.S.C. § 1343, and Title 42 U.S.C. §§ 1981, 1983. This case involves rights under the federal constitution.

The facts are virtually undisputed in this case. Defendant's Exhibit D (introduced at trial) contains excerpts of defendant board meetings and actions from January 1949 to the present concerning the matter of school desegregation. A clear and concise history is presented therein, and it is against this background that petitioners largely rest their case.

Prior to 1949, defendant board followed the "separate but equal" doctrine in pupil assignment. In 1949 the Indiana Legislature, enacted legislation declaring such doctrine to be no longer permissible (See App. 9 ). There upon, the defendant board on April 11, 1949, immediately proceeded to comply with this new Act of the Indiana Legislature. Commencing in 1949-50 upon a grade per year basis, the dual system had been eliminated by 1957. Thereafter, all children residing within a geographical area of a given school in Evansville had the right to attend such school regardless of race. The attendance plan was based upon the traditional "neighborhood school" concept, without discrimination as to race or color. In 1962, Lincoln High School was dissolved due to declining enrollment (economy reasons) and each of the surrounding high school attendance zones was extended into the Lincoln attendance area (similar to pie slices) a few years later when the new "Central" High School was opened. In 1962, the "freedom of choice" plan was rescinded by the defendant board and all students regardless of race were required to attend the school in whose district they resided. In 1966, the voluntary transfer plan sometimes called "majority to minority" plan, was instituted. Thus, for at least the last ten years, defendant has maintained a unitary system without discrimination as to race or color. As said by Dr. Morgan, an

executive in defendant school corporation, during the trial:

> Q. 80. (by Mr. Smith) Dr. Morgan is the race of a student presently considered in the assigning of students among the elementary schools?
>
> A. (by Dr. Morgan) To my knowledge it has not been until this time – until this proposed plan has been presented.

Thus, up to the adoption on November 17, 1971, of the "desegregation" plan, all students, regardless of race, were required to attend the elementary school located in the area of their residence unless they took advantage of the voluntary transfer plan. School assignment was on a geographic basis, and the school location was determined in part by population density, future growth of the area, physical facilities, etc. The attendance zones, prior to 1971, were based upon the residence of the pupils, and not their race or color.

It is important to note that the attendance zones for the 37 elementary schools within defendant's school district were not gerrymandered in order to perpetuate segregation. At one time, both Stanley Hall and Wheeler were primarily "white" schools. These two schools are located in the so-called "inner-city" of Evansville and like all other cities, both north and south, became majority "black" schools through shifting neighborhood patterns. These two schools are to be closed, pursuant to the 1971 plan of defendant. Lincoln, prior to World War II, was bounded on the south and east with white neighborhoods, but, as in the case of Stanley Hall and Wheeler, it too has become located in the middle of black neighborhood.

Like many of her sister cities in the north, certain of defendant's schools became identifiable "black" or identifiable "white" not through any scheme or design by official action, but due to voluntary change in the neighborhood residential pattern in these cities. Evansville's history is very similar to Gary,[1] Indiana, which was involved in similar litigation in 1967.

[1] Bell v. School City of Gary (1963 CA7 Ind) 324 F2d 209, cert den 377 US 924, 12 L ed 2d 216, 84 S Ct 1223.

For example, Chestnut-Walnut school originally was an identifiable "white" school and then became an identifiable "black" elementary school, before being closed in 1957 for economic reasons. Likewise, Lincoln remained, up to 1971 as a virtually all "black" school, but this was not due to any official state action. Lincoln is located in a predominately Negro area and that is the reason why it is an identifiable "black" school as was the case in Gary, Indiana. It has not been shown that defendant ever took any affirmative action to perpetuate segregation in Evansville-Vanderburgh County.

These then were the existing facts in 1971 when H.E.W. appeared on the scene. As a result of the pressure of H.E.W.,[2] defendant adopted a desegregation and racial balance plan on November 17, 1971, involving Baker, Columbia, Delaware and Lincoln Elementary Schools. A copy of this plan is attached to petitioner's original complaint. These three schools are located in majority white neighborhoods and located within 1.2 miles of Lincoln School. The plan provides for a reassignment of white pupils from the Columbia, Baker and Delaware School districts to the Lincoln Elementary School, and a reassignment of black pupils from the Lincoln district to Columbia, Baker, Delaware and some eight other majority "white" elementary schools. As a result of this racial balance plan, defendant projects an estimated 70% white and 30% black in each of the four said schools. The proposed plan, among other things, calls for the transfer of 175 black children from Lincoln to Columbia, 123 black children from Lincoln to Delaware, and 164 black children from Lincoln to Baker, with 134 white children to be transferred from Baker to Lincoln, 80 white children from Columbia to Lincoln, and 157 white children from Delaware to Lincoln. It will result in increasing the enrollment in each of the four schools. The plan calls for 3,040 out of 22,280 or approximately 13.6% of the children to be bussed or reassigned. The plan will result in gerrymandering attendance zones in order to establish the desired racial

[2]U.S. Dept. of Health Education and Welfare.

balance in the 4 schools. None of the attendance zones for the four schools will be continuous and contiguous to any of said schools.

As a result of defendant's 1971 racial balance plan, certain white children (petitioners herein) presently attending Columbia, Baker and Delaware Elementary Schools will be bussed/transferred to Lincoln School in order to schieve racial balance among the four said schools. No white children from the remaining 33 elementary schools are to be bussed/transferred into Lincoln School pursuant to defendant's 1971 plan, although a number of these schools are to receive the black children from Lincoln. This action was instituted by the parents and children who are to be bussed or reassigned from Columbia, Baker and Delaware to Lincoln School.

On appeal, the Seventh Circuit Court of Appeals affirmed and held, in short, that the defendant board had the right to voluntarily adopt this racial balance plan if it so desired.

The following events occurred subsequent to trial herein and due to their relevancy are called to the Court's attention. On May 10, 1972, defendant board formally approved implementation of the 1971 plan by a four-three vote, and on August 2, 1972, due to change in board personnel, the board rescinded said racial balance portion of the 1971 plan which it had previously approved on November 17, 1971, and May 10, 1972, and which was the subject of complaint inthe instant case. By virtue of another action in the same district court the defendant board was ordered to reinstate the 1971 plan requiring bussing to achieve racial balance among the four said schools. The district court also took over jurisdiction of defendant school system. Thus, the plan "voluntarily" adopted by defendant on November 17, 1971, which was later rescinded, has now become a required court order by virtue of Martin et al., v. Evansville-Vanderburgh School Corporation[3] as of September 5, 1972.

[3] Martin, et al., v. Evansville-Vanderburgh School Corporation of Evansville, Vanderburgh County, Indiana (Southern District of Indiana, No. EV 71-C-79). Not as yet reported.

## REASONS FOR GRANTING THE WRIT

1. The decision below results in:

   (a) denying to plaintiffs equal justice under the law.

   (b) discriminating against plaintiffs because of their race, as provided in the U.S. Constitution.

   (c) violates plaintiffs rights under Act 8 Sec. 1 of Indiana Constitution.[4]

The school system presently operating in Evansville, Vanderburgh County, Indiana is non-discriminatory. The defendant was, and is, operating a unitary system without regard to race or color in pupil assignment. The defendant's system is essentially the same as other school systems throughout the general northern part of the United States.

Whether defendants 1971 plan was in effect court ordered, or voluntarily adopted, the ultimate affect is the same insofar as these plaintiffs are concerned. The enfringement upon their rights remain the same.

The importance of this case lies in its uniqueness. As of the present time the Supreme Court of the United States has not passed upon the question herein presented, i.e., the use of race as a basis for pupil assignment in a school system that has heretofore based its assignments upon the residence of the pupils regardless of race or color.

The significance of this case lies in its potential impact on other northern unitary school systems who possibly at one time or another operated a legally permissible segregated facility. And by this I do not mean a school system being operated in the fashion of the school board in Swann vs.

[4]Common schools. – Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Charlotte-Mecklenburg Board of Education.[5]

The Supreme Court cases from Brown I and II[6] through Swann have all dealt with a southern type dual system where the school boards had a history of resisting the mandate of Brown I and II[6] to eliminate state imposed segregation. That is certainly not the factual situation presented in the instant case. The record clearly indicates that the defendant board, prior to H.E.W. intervention, had a history of complying first with the law prior to 1949 and then with the law after 1949. Since at least 1957 no child has been forced to attend a certain school because of his color nor has any child been denied the right to attend a school because of his color.

Something new has now been injected into defendant school system as a result of defendant's 1971 racial balance plan, as follows:

Racial discrimination is now being practiced in determining pupil assignment.

As a result of this new policy plaintiffs are:

Being denied equal justice under law.

Plaintiffs are being discriminated against because of their race. This is a direct violation of the Fourteenth Amendment rights guaranteed by the Constitution of the United States. It also clearly violates the holding of Brown I supra. As said in Brown II supra:

> "The Fourteenth Amendment prohibits a state from making racial distinction in the exercise of governmental power"

and also on page 1105 therein:

> "To that end, the courts may consider . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis . . ."

[5] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 28 L.Ed. 554. (1971)

[6] Brown v. Board of Education, (1954) 347 U.S. 483, 98 L.Ed. 873 and 349 U.S. 294, 99 L. Ed. 1083

The Brown cases established the fundamental principal that racial discrimination or distinction in public education is unconstitutional under the Fourteenth Amendment.

Prior to defendants "1971 plan", the defendant school system was being operated within the mandate of Brown I and II. By the adoption of the "1971 plan" the defendant board is now operating in direct conflict with the court's ruling in those two cases. As further indicating the court's objection to racial classification for purposes of pupil assignment, I call the court's attention to the cases of Bolling,[7] Jefferson County,[8] Goss,[9] and Deal.[10] There are also a number of lower court opinions also disapproving the use of racial classification in pupil assignment, i.e., Bell supra, Briggs,[11] Evans,[12] Ellis,[13] Bryant[14] and Boyd.[15]

[7] Bolling v. Sharpe, 347 U.S. 497.

[8] U.S. v. Jefferson County Board of Education, (1966) 372 F(2) 836 aff'd. 380 F(2) 385 (1967).

[9] Goss v. Board of Education, 373 U.S. 683, 10 L.Ed. 2d 632, 83 S.Ct. 1405.

[10] Deal v. Cincinnati Board of Education, (6th Circuit, 1966) 369 F(2) 55.

[11] Briggs v. Elliott, (ESDC), 132 F. Supp. 776, 777.

[12] Evans v. Buchanan, 207 Fed. Supp. 870.

[13] Ellis v. Board of Education of Orange County, Florida, (5th Circuit) (1970) 423 F.(2) 203.

[14] Bryant v. Board of Education (U.S.D.C., S.D.N.Y., 1967) 274 F.Supp. 270.

[15] Boyd v. Pointe Coupee Parish School Board, (U.S.D.C.E.D. La. 1971) 332 F. Supp. 994.

We must address ourselves to this question:

> "Are plaintiff children being treated equally with the other children in defendant's system, or are they being discriminated against because of their race?"

If equal justice under law means what it appears to mean, then the rights of plaintiffs are to be equally considered with those of all other children, i.e., "black", and all children are to be treated the same under law, regardless of their race. This is the fundamental question presented in this case. Plaintiffs do not believe that the law allows one child to be treated differently than another child because of race or color. This kind of discrimination was struck down by Brown and if it applies to one race it certainly applies equally to another race. Needless to say, if plaintiffs were black children there would be no question as to their Fourteenth Amendment rights being violated by defendant's action. Can it be said that these plaintiffs do not enjoy those same rights?

The Swann case supra is not controlling precedent in this case. The law of that case is not applicable herein because the facts in each case are entirely different. If the decision in Swann can be extended to apply to the facts herein, then there would scarcely be a school jurisdiction in the United States which could not be interpreted or coming under "the umbrella of its' (Swann) protection." Such a prospect is indeed awesome, and would foretell unimagined consequences.

As I perceive the Swann case, it was directed as a school board which had intentionally "dragged its feet" in complying with the mandate of Brown II.

We believe the instant case fairly presents a typical northern school system with a history of compliance with existing law. If the court is of opinion that plaintiffs constitutional rights are not being violated we would then ask the court under what circumstance can a board choose to use race as a basis for pupil assignment without enfringing on the child's constitutional rights under the Fourteenth Amendment.

2. The decision below results in plaintiffs being denied their equitable rights.

The jurisprudence of equity largely determines cases such as herein presented. Particularly is this so when remedial measures are involved, such as was mandated by Brown II. Thus, the courts have largely relied upon equity in making their decisions.

One of the fundamental maxims of equity "declares that equality is equity" Southerland v. Mayer.[16] As said in 27 American Jurisprudence (2) p. 652:

> "Accordingly, equity will treat all members of a class on an equal footing, and will impose burdens or distribute rights without preference, either equally or in proportion to the several interests."

Apply this maxim to the facts of this case. If it was inequitable to bus black children away from a school nearest their residence because of their race (as in Brown v. Board of Education) then it is equally inequitable to bus plaintiff children away from their respective neighborhood schools (Columbia, Baker and Delaware) because of their race.

3. The decision below, unless reversed, will result in the eventual destruction of the neighborhood school in all the United States.

Schools have historically existed for the benefit of its pupils. The quality of their education has always been the first consideration. At no place has it been suggested that defendant's 1971 "plan" was designed to improve the quality of plaintiffs education. The term "equality of education" has been loosely used in these desegregation cases. As was so intelligently discussed in the Amicus Curiae Brief by the San

[16] Southerland v. Mayer 271 U.S. 272, 70 L.ed 943, 46 S.Ct. 538.

Francisco parents filed in the "Denver"[17] case, this term is indefinable, and has led to much confusion in the field of education. Apart from the constitutional question, it is now virtually conceded by the country's leading sociologists that this whole matter of forced desegregation in the public schools has had no appreciable effect upon the Negro children from the standpoint of education.

In the instant case, it is hard to imagine how the moving of black children out of their neighborhood school and putting white children in their seats is going to result in benefiting or improving the education of any of the children involved. The tragic result of this plan is compounded when you consider that the values and advantages of the neighborhood school concept, as an acceptable education policy, have not been disproved.

Thus, if the undisputed facts herein can justify such a racial balance plan, then this fundamental part of our social structure will have been destroyed.

4. If defendant's 1971 plan is allowed to stand, there will be no recognizable limit to the exercise of federal control over the public schools.

The defendants 1971 plan is the result of the incorrect conclusion of H.E.W. that because one elementary school in Evansville, Vanderburgh County (out of 37) was virtually all black this was conclusive evidence of a constitutional violation by the board. This conclusion is contrary to the undisputed facts. See defendant's Exhibit D in the trial below and certified herein. The undisputed fact is that this one elementary school (Lincoln) is located in a majority black

[17] Wilfred Keyes el al., v. School District No. 1, Denver, Colorado, et al., No. 71-507. 445 F 2d 990 (10th CIR. 1971) Cert. granted 92 S. Ct. 707 (Jan. 17, 1972) Presently pending in this court.

neighborhood, and was not the result of any official action on the part of the school board.

Thus if such a racial balance plan can be thrust upon Evansville, Vanderburgh County, Indiana then this Court has embarked upon dangerous and unchartered seas. If racial quotas are to become the law of the land, then it should be so stated. Otherwise, the extent of local control over school matters will be uncertain. Such a holding could conceivably be applied to private housing, etc.

Again, Petitioners wish to emphasize the fundamental difference between the past actions of defendant board and those of its neighboring boards in the south. In an unbroken chain since 1954, the decisions of this Court have dealt with southern school systems who were resisting the mandate of Brown v. Board of Education. This Court has not, as yet dealt with a northern unitary school system, admittedly being operated in a non-discriminatory manner.

## CONCLUSION

For the reasons stated above, Petitioners ask that their petition be granted or the cause be remanded, and for all further and proper relief in the premises.

Respectfully submitted,

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## Opinions Below

The opinions below of the District Court and the Court of Appeals are as set forth in the Appendix to the Petition herein. The Order and Memorandum of Decision of the District Court for the Southern District of Indiana in Martin, et al. v. Evansville-Vanderburgh School Corporation of Evansville, Vanderburgh County, Indiana, No. EV 71-C-79, entered as of September 5, 1972, not as yet reported, is set forth in the Appendix to this "Brief for Respondents in Opposition".

## Question Presented

The "Questions Presented" as stated in the Petition are not stated in terms of the findings of fact in this case. Petitioners have improperly attempted to raise questions relating to the Fourteenth Amendment in general terms, irrelevant to the question presented in this case. The question presented is simply whether the Court of Appeals properly affirmed the findings and judgment of the District Court denying the application of the Petitioners, who are parents of white children attending predominantly white schools, to enjoin the Respondent School Corporation from implementing its own school desegregation plan adopted November 17, 1971, long before the complaint in this cause was ever filed on December 6, 1971, where the plan provides for (1) the reassignment and transporting (busing) of both white and Negro children in four elementary grade schools and (2) the closing of three inadequate schools, two attended by predominantly Negro children, and consequent reassigning and transporting (busing) of both white and Negro children in four elementary grade schools and

(2) the closing of three inadequate schools, two attended by predominantly Negro children, and consequent reassigning and transporting (busing) of children from those and other schools, in both cases to achieve a greater educational opportunity for the school children involved and to insure that these schools will become racially mixed with the percentage of Negroes no greater than 30%.

## Statement of the Case

Petitioner's "Statement of the Case" distorts the actual facts as found by the District Court. Petitioners make selective references to certain of the evidence presented as a basis for their legal arguments and theories. Petitioners even use bold face type to claim that the Defendant School Corporation has maintained a unitary school system (p. 2), although the District Court expressly found that it was not necessary to make any finding "as to whether Defendant School Corporation retains any vestiges of a de jure segregated school system", and this finding was expressly noted by the Court of Appeals in its Opinion (Appendix, p. 2). Hence Respondent School Corporation is obliged to restate the case in terms of the findings of fact made by the District Court. Page references are to the pages in Petitioner's Appendix.

The desegregation plan was adopted in November, 1971, and provided for the closing of three elementary schools with attendant cost savings of $60,000 a year and a desegregation exchange program for both white and Negro children for four elementary schools (Appendix, pp. 5, 7). These schools were closed because there would be fifty classrooms available in September, 1972, that would not be needed in

the school system because of new school construction and a drop in enrollment (Appendix, p. 7). The plan provided for the closing of one small school that, because of the size, is insufficient, and two antiquated and educationally insufficient elementary schools with a high percentage of Negro students (Appendix, p. 7). The District Court expressly found the assignments of the students formerly attending the two elementary schools with a high percentage of Negro students are made "insofar as possible so that the students will attend elementary schools in the same districts as the high schools they will be attending and to achieve a greater distribution of Negroes among the Defendant School Corporation's elementary schools" and further that "All the elements of the Plan are made to provide more equal educational opportunities for the students in the schools in which changes in attendance areas are to be made, to eliminate elementary schools at which there is a predominantly Negro enrollment" and further that "The changes contemplated by the Plan including in particular the change in racial balance in the Defendant School Corporation's elementary schools, are valid objectives from an educational standpoint" (Appendix, p. 7). There was no evidence to the contrary.

Petitioners set forth only certain selected evidence, and do not make reference to the uncontradicted evidence presented during the trial that busing to achieve racial balance is a valid education objective (Trial Transcript, p. 73, 92); that the desegregation plan will lead to a better educational opportunity for all students and a better racial climate in the school system (Trial Transcript, p. 155); and that busing has occurred in the high schools to achieve racial balance since September, 1970 (Plaintiff's Exhibit 8; Trial

Transcript, p. 135-136). Petitioners conject that an additional reason for the adoption for the desegregation plan was "pressure of HEW" (p. 4), but there is no finding as to any such "pressure" nor would any such "pressure", even if it existed, be relevant in this proceeding.

## Argument

### I.

### No Conflict in Circuits

The thrust of Petitioners' argument appears to be that a school board "in the north" does not have the power constitutionally to take steps to desegregate its schools on its own initiative and not pursuant to any order of any court. However, Petitioners do not set forth any of the reasons for granting a writ of certiorari which are listed as considerations in Supreme Court Rule 19. Petitioners do not assert that this decision is in conflict with the decision of another court of appeals on the same matter. In fact, all courts of appeals, without exception (north and south) that have considered this question have determined that school boards have the right voluntarily to desegregate their school systems.

In Springfield School Committee v. Barksdale (1965) 348 F. 2d 261, the Court of Appeals for the First Circuit, in considering a resolution of school authorities in Springfield, Massachusetts, to take appropriate action "to eliminate to the fullest extent possible, racial concentration in the schools within the framework of effective educational procedures" said as follows (p. 266):

" . . . 'It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. This evil satisfies whatever "heavier burden of justification" there may be. Cf. McLaughlin v. State of Florida, 1964, 379 U.S. 184, 194, 85 S.Ct. 283, 13 L.Ed.2d 222. It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them. Booker v. Board of Education etc., 1965, 45 N.J. 161, 212 A. 2d 1, 11 A.L.R.3d 754 * * *.'"

In Offermann v. Nitkowski (1967) 378 F.2d 22, the Court of Appeals for the Second Circuit said as follows (p. 24):

"That there may be no constitutional duty to act to undo de facto segregation, however, does not mean that such action is unconstitutional. Since Brown is the law, some attention to color count is necessary to see that it is not violated, for it affirmatively requires admission to public schools on a racially non-discriminating basis. What is prohibited is use of race as a basis for unequal treatment."

In Wanner v. County School Board of Arlington County, Va. (1966) 357 F. 2d 452, the Court of Appeals for the Fourth Circuit said as follows (p. 455):

> "No case was cited to this court, nor has one been found, which has prohibited a school board, when drawing or redrawing school attendance lines, from reducing or eliminating segregation, even where segregation was de facto; much less when brought about by a deliberate policy of separation of the races."

In Deal v. Cincinnati Board of Education (1966) 369 F. 2d 55, cert. denied 389 U. S. 847, 88 S. Ct. 39, 19 L. Ed. 2d 144, the Court of Appeals for the Sixth Circuit said as follows (p. 61):

> "Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, it has been held that it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sount j ment such action is the best method of avoiding educational harm. Balaban v. Rubin, 14 N.Y.2d 193, 250 N.Y.S.2d 281, 199 N.E.2d 375 (1964), cert.denied 379 U.S.881, 85 S.Ct. 148, 13 L.Ed.2d 87 (1964); Morean v. Board of Education of Montclair, 42 N.J. 237, 200 A.2d 97 (1964)."

II.

Decision Not in Conflict With Any Decision of This Court

This decision is not in conflict with any applicable decision of this Court, also a consideration listed in Supreme Court Rule 19. The Respondent School Corporation is entitled, under the United States Constitution, to consider the race of elementary school students in preparing its own plan for desegregating certain of its elementary schools, adopted November 17, 1971, for the purpose, in part, of achieving a better educational opportunity and a more equal distribution of white and Negro children in the affected schools. The Respondent School Corporation followed the guidelines set forth in Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554, as follows (p. 566):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."

Also, in North Carolina Board of Education v. Swann, 402 U. S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971) the Court stated (p. 589):

> "We observed in Swann, ___ US p. ___, 28 L Ed 2d p. 566, 91 S Ct ____, that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

Although this Court was dealing with a de jure segregated school system in North Carolina, this Court makes it clear that the right of a school corporation itself to achieve a measure of racial balance is determined to be a matter of educational policy within the discretion of a school board itself, and this educational policy will obviously be a valid policy for a school corporation, north or south, whether previously operating a dual or unitary school system. The question whether a court could force a school corporation to take such remedial action is a different matter entirely.

Furthermore, this Court on January 15, 1968, dismissed an appeal in School Committee of Boston v. Board of Education (1967), 227 N. E. 2d 729, which challenged the statute

providing for elimination of racial imbalance in public schools, "for want of substantial federal question". 389 U. S. 572, 88 S. Ct. 692, 19 L. Ed. 2d 778.

More recently, this Court again, on May 3, 1971, affirmed the judgment in Lee v. Nyquist (1970) 318 F. S. 710, decided by a three-judge court in New York, which enjoined enforcement of a New York statute prohibiting school boards from assigning pupils to schools for the purpose of achieving a racial balance. Nyquist v. Lee, 402 U. S. 935, 91 S. Ct. 1618, 29 L. Ed. 2d 105.

III.

Decision Moot

As a further and separate reason for denying this Petition, this case is now moot, on the terms presented by the Petitioners, because in any event, the District Court has determined as of September 5, 1972, that the Respondent School Corporation is operating a de jure segregated school system. Therefore, even by the reasoning of Petitioner, the Swann case would be applicable.

Conclusion

For the foregoing reasons, Respondents respectfully pray that the Petition be denied.

Respectfully submitted,

ROBERT H. McKINNEY

November 7, 1972

# RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| WAYNE MARTIN, EVELYN MARTIN, TRACY MARTIN, VICKY MARTIN, By their parent and next friend, OSCAR MARTIN, et al, | ) | |
| Plaintiffs, | ) | |
| -vs- | ) | NO. EV 71-C-79 |
| EVANSVILLE-VANDERBURGH SCHOOL CORPORATION OF EVANSVILLE, VANDERBURGH COUNTY, INDIANA, | ) | |
| Defendant. | ) | |

ORDER

This cause having been heard by the Court, and the Court having this day filed its findings of fact and conclusions of law in the form of a Memorandum of Decision as follows:

(H. I.)

It is therefore considered and ordered as follows:

1. The defendant Evansville-Vanderburgh County School Corporation, its agents, servants, officers, employees and successors, and all persons in active concert or participation with them, are hereby enjoined from discriminating on the basis of race or color in the operation of the Evansville-Vanderburgh County school system.

2. The defendant is specifically enjoined from putting into effect its August 7, 1972, attendance plan for elementary pupils.

3. The defendant is ordered to reinstate and implement its May 10, 1972, attendance plan for elementary pupils for the 1972-73 school year forthwith, which plan is approved as an interim plan tending to accomplish the objectives of order number 1, supra.

4. The defendant is directed to prepare a final plan for accomplishing the objectives of said order number 1 on or before January 1, 1973, and to submit the same for the approval of the Court on or before January 10, 1973. Said plan shall be a plan for the operation of all of the public schools within defendant's boundaries, including, but not limited to, the nondiscriminatory allocation of resources, the establishment of schools, including middle schools, pupil populations and placement, faculty and staff allocation, transportation routes, extracurricular activities, and programs designed to eliminate racial misunderstandings.

5. This Court will retain continuing jurisdiction over the defendant until an acceptable plan is finally approved.

It is further considered and adjudged that the defendant pay the costs of this action.

Dated this 5th day of September, 1972.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

Copies to:
Ronald Warrum, 113 N.W. 5th Street, Evansville, Indiana, 47708
Joe S. Hatfield, 1600 Old National Bank Building, Evansville, Indiana, 47708
Lewis C. Bose, 1100 First Federal Building, Indianapolis, Indiana, 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| WAYNE MARTIN, EVELYN MARTIN, TRACY MARTIN, VICKY MARTIN, By their parent and next friend, OSCAR MARTIN, et al, | ) | |
| Plaintiffs, | ) | |
| -vs- | ) | NO. EV 71-C-79 |
| EVANSVILLE-VANDERBURGH SCHOOL CORPORATION OF EVANSVILLE, VANDERBURGH COUNTY, INDIANA, | ) | |
| Defendant. | ) | |

MEMORANDUM OF DECISION

This cause came on for hearing on August 11, 1972, on plaintiffs' petition for a preliminary injunction, enjoining the defendant from operating its public school system in a racially discriminatory manner, in violation of the Fourteenth Amendment rights of plaintiff Negro children to equal protection of the laws. At the conclusion of the evidence, which was largely undisputed, the Court ordered the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Rule 65(a)(2), Federal Rules of Civil Procedure. The Court thereupon entered a permanent injunction against the defendant, pursuant to partial findings of fact and conclusions of law expressed orally from the bench. This memorandum amplifies and

reduces to writing such findings and conclusions, nunc pro tunc, in accordance with Rule 52(a), F.R.C.P.

## Background Facts

Defendant is a public school corporation organized under the laws of the State of Indiana, with geographical boundaries coterminous with Vanderburgh County, Indiana. The City of Evansville, a city with a 1970 population of 138,764, is located within the county and a substantial number of Negroes are included in its total population. During the school year 1971-72 Negro children made up 9.8% of the elementary school enrollment in defendant's schools.

Until at least 1949[1] the public schools operated by Evansville School Corporation, one of the school corporations merged into defendant in 1958, were racially segregated, as was stipulated by the parties. Not only was segregation practiced by such corporation as to children living within its boundaries, but it cooperated in maintaining all white public schools in communities outside the borders of Vanderburgh County by accepting enforced transfers of Negro pupils from such places as Boonville and Yankeetown, in Warrick County, and Rockport,[2] in Spencer County, to its all black schools located in central Evansville.

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[1] In 1949 the General Assembly of Indiana enacted a statute, Acts 1949, Ch. 186, p. 603, Burns Ind.Stat.Ann. §§28-6106, et seq., which banned racial segregation in tax supported educational facilities within the state.

[2] It is 31 miles from Rockport to Evansville; thus Negro pupils were required to be bussed a round trip distance of 62 miles per day to attend defendant's segregated schools.

In 1962, defendant discontinued high school classes at the Lincoln school, theretofore its all-Negro high school. In 1970 it adopted a plan for high school students which resulted in Negro students being assigned to the five high schools in the system on a well integrated basis. No such plan was adopted at that time to desegregate the racially identifiable grade schools. It was not until November 17, 1971, that the defendant, after pressure from the United States Department of Health, Education and Welfare, adopted a plan which would have accomplished a degree of progress in this regard.

The 1971 plan was attacked from two directions. The plaintiffs in this action, black pupils and their parents, maintained that it did not go far enough to eliminate the vestiges of racial segregation, as required by the Fourteenth Amendment, and sought injunctive relief to require defendant to adopt a more comprehensive plan. At about the same time, another action, brought against the defendant by certain white children and their parents, was filed in the Vanderburgh Circuit Court and removed to this court. The latter action sought to enjoin implementation of the November 17, 1971, plan on the ground that defendant had no right to enact any plan at all which would alter the so-called "neighborhood school" system.

The action brought by the whites was tried by this Court in February, 1972, and judgment was entered for the defendant school corporation.[3] It was not necessary in such case

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[3] This Court's decision has recently been affirmed. Adams, et al., v. Evansville-Vanderburgh School Corporation, et al, No. 72-1413; 7 Cir., August 21, 1972 (slip opinion).

for the Court to consider the constitutional implications of the school corporation's past practices, but instead the finding was simply that the defendant, in its discretion, had the right to take action tending to reduce the then existing segregation, both under the 1949 Indiana Act and as held in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

The present action was placed on this Court's trial calendar for the June, 1972 term. Meanwhile, however, the defendant continued to consider the problem of elementary school desegregation and adopted a revised plan under date of May 10, 1972, to become effective for the 1972-73 school year. This plan was satisfactory to plaintiffs, and on June 15, 1972, the parties filed a stipulation of dismissal, which was approved by the Court the following day. In its order of dismissal, the Court found that the acts taken and to be taken by the defendant (the adoption of the new plan and its implementation), voluntarily and not pursuant to court order, were proper and would satisfy the obligations of the defendant under the equal protection clause of the Fourteenth Amendment. The order further provided that the dismissal would be without prejudice in the event the defendant failed to carry out the actions contemplated by the May 10 plan.

The defendant's board is made up of seven members, who adopted the May 10 plan by a vote of 4-3. The term of one of those members who voted in the affirmative expired on or about June 30, 1972, and a new member was appointed by the Mayor of Evansville. On August 2, 1972, with the new member voting in the affirmative, the reconstituted board adopted a resolution purporting to rescind the court approved May 10 plan, and thereafter, on August 7, adopted a different plan for the 1972-73 school year.

Meanwhile, on August 4, plaintiffs filed their motion to reinstate this action for failure of the defendant to implement the May 10 plan.

On August 8, 1972, the Court granted plaintiffs' motion to reinstate and reopen the case, pursuant to its previous order of June 16, 1972, and Rule 60(b), Federal Rules of Civil Procedure. The hearing of August 11 followed, after notice to the defendant, and evidence was heard on the merits of plaintiffs' second amended complaint.

## Operative Facts

Prior to the year 1949, total segregation of Negro pupils was the rule in defendant's schools. In that year, three schools were operated for blacks: The Chestnut-Walnut school, for grades K-5, the Third Avenue school, for grades 1-7, and the Lincoln school, for grades K-12. The Third Avenue school was located in a white residential area, but no whites attended the school; on the other hand, black pupils were bussed to the school by defendant from other sections of the city of Evansville. The situation at Third Avenue remained the same until the school was closed in 1957.

Following the enactment of the 1949 Indiana Desegregation Act, the defendant followed a familiar ploy[4] by adopting optional attendance zones for areas where the population was demographically mixed. This resulted in white pupils choosing to attend white schools, and black pupils for the most part "choosing" to attend black schools. However, during the period 1949-56 a few blacks chose to attend and

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[4] See United States v. Board of Sch. Com'rs, Indianapolis, Ind., 332 F.Supp. 655, at 668 (S.D. Ind. 1971).

did attend elementary school at Wheeler, Stanley Hall, or Cedar Hall. When the Third Avenue school was closed in 1957, its pupils were sent to Chestnut-Walnut and Lincoln. When Lincoln high school was discontinued in 1962, the Chestnut-Walnut school was discontinued, and its pupils assigned to Lincoln, now a K-8 elementary school.

During their respective periods of existence, Third Avenue and Chestnut-Walnut has all black faculties. The same was true, with rare exceptions, at Lincoln until the past three school years, during which years the percentage of black faculty was, respectively, 66.6%, 63.6% and 48.4%. During the 1971-72 school year the percentage of Negro enrollment at Lincoln was 99.82%, and it had never been lower than approximately 99% at any time in its existence, although for many years the residential area immediately to the south and east of the school was predominantly white, and white pupils reside within walking distance of the school at the present time.

As a result of defendant's racial policies in establishing gerrymandered school districts, the percentage of Negro pupils in the Stanley Hall elementary school had risen to 59.94% at the time plaintiffs' action was filed, and in the Wheeler school to 76.04%. Although only 6% of all faculty personnel is Negro, the percentages in these two schools were 21.9% and 20.0%, respectively.

The plan adopted by defendant November 17, 1971, as modified and expanded by its amendment of May 10, 1972, would have closed the Stanley Hall and Wheeler schools, together with the Armstrong School, a rural, white school with an insufficient number of pupils, and would have reassigned pupils from the closed schools, and from the Lincoln school and other schools in the

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system so that all of the elementary schools in the system, save one, would have had Negro pupils, and only one additional school would have had a Negro enrollment of less than 1%; Lincoln's enrollment would have been reduced to 22.6%. All faculty and staff would have been assigned throughout the system according to the Singleton plan, i.e., distributed at each school according to the total percentages of Negroes and whites employed by the defendant.

On the other hand, the plan of August 7, 1972, would leave five of the thirty-four remaining elementary schools as all white schools, and thirteen additional schools with a Negro enrollment of less than 1%. In other words, over half of the schools would remain all white, or virtually all white. Six schools would have a Negro enrollment of 20% or more, as opposed to only two under the May 10 plan. Under the August 2 plan, Lincoln would continue to have a black student body of 76.9%, and the Howard Roosa school, never before a racially identifiable school, would become racially identifiable by having its black enrollment increased from the 1971-72 38.63% to 51.1%! The comparative statistics for all remaining schools under both plans are set out in the footnote following.[5]

| Elementary Schools | 5-10-72 Board Plan | 8-2-72 Board Plan | Elementary Schools | 5-10-72 Board Plan | 8-2-72 Board Plan |
|---|---|---|---|---|---|
| Baker | 18.8 | 20.4 | Highland | 11.5 | 0 |
| Caze | 7.2 | .3 | Howard Roosa | 19.3 | 51.1 |
| Cedar Hall | 19.3 | 19.3 | Lincoln | 22.6 | 76.9 |
| Columbia | 15.9 | .6 | Lodge | 7.0 | .7 |
| Culver | 19.3 | 21.5 | McGary | 6.8 | 1.7 |
| Cynthia Heights | .5 | .5 | Oak Hill | 9.0 | .3 |
| Daniel Wertz | 2.4 | 2.4 | Perry Heights | 9.8 | .7 |
| Delaware | 17.7 | 10.4 | Plaza Park | 5.0 | .6 |
| Dexter | 3.7 | 17.8 | Scott | 0 | 0 |
| Evans | 5.5 | 0 | Stockwell | 12.6 | .7 |
| Fairlawn | 5.1 | 0 | Stringtown | 5.1 | .3 |
| Fulton | 5.6 | 30.6 | Tekoppel | 7.9 | 0 |
| Glenwood | 28.5 | 28.5 | Thompkins | 16.8 | 1.3 |
| Harper | 3.4 | 18.6 | Vogel | 8.3 | .2 |
| Harwood | 3.7 | .7 | Washington | 6.0 | 2.6 |
| Hebron | 16.6 | 15.3 | West Terrace | 8.2 | .9 |
| Helfrich Park | 8.7 | .8 | White | 14.0 | 14.0 |

The principal reason advanced by the defendant for its August actions was that it proposed to establish a middle school program, to be fully effective in 1977, and that it was necessary for all children to attend school in their own neighborhoods "for planning purposes." Although the middle school concept may well have merit, if such schools are located so as to reduce segregation, the argument that planning can only go forward if pupils attend the nearest elementary school in the interim strikes the Court as fatuous.

## Conclusions of Law

The Court has jurisdiction of the parties and of the subject matter of this action. 28 U.S.C. §§1343(3), 1343(4); 42 U.S.C. §1983; Amendment Fourteen, Constitution of the United States.

The defendant and its predecessor Evansville School Corporation have practiced de jure segregation in the operation of the Evansville, now Evansville-Vanderburgh County public school system, and have discriminated against Negro pupils in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The defendant has therefore, since the day that it came into existence, been under a continuing duty to remove all vestiges of prior segregation, but has failed to do so, most notably in the matters of the Lincoln school and in the assignment of faculty. Swann v. Charlotte-Mecklenburg Bd. of Ed., supra; Green v. County School Board, 391 U.S. 430 (1968); United States v. Greenwood Municipal Separate School District, 406 F.2d 1086 (5 Cir. 1969); Kelly v. Altheimer, 378 F.2d 483 (8 Cir. 1967).

The defendant committed an act of de jure

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segregation when on August 2, 1972, it rescinded its own May 10, 1972, plan to desegregate the elementary schools. The rescission of a school desegregation plan, previously adopted by a school board pursuant to an existing duty, is unconstitutional, and the action of August 2, 1972, is a nullity. North Carolina Bd. of Ed. v. Swann, 402 U.S. 43 (1971). Bradley v. Milliken, 443 F.2d 897 (6 Cir. 1970); Keyes v. School District No. 1, Denver, Colorado, 303 F.Supp. 279, 313 F.Supp. 61 (D. Colo. 1969, 1970).

The law is with the plaintiffs. A permanent injunction will issue, enjoining defendant from discriminating on the basis of race or color in the operation of its schools, from implementing its August 7, 1972 plan, reinstating the May 10, 1972 plan as an interim measure, and ordering the defendant to complete a final plan for elimination of the last vestiges of racial segregation from its school system before January 1, 1973. Said final plan, which may contain provisions for middle schools, shall be filed not later than January 10, 1973, for the approval of the Court.

Dated this 5th day of September, 1972.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

Copies to:
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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-596

No. A-264

EMIL F. ADAMS, ET AL,
*Petitioner*

vs.

EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, ET AL.,
*Respondent*

## PETITIONER'S APPENDIX

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No. 72-1413

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EMIL F. ADAMS, et al.,

*Plaintiffs-Appellants,*

vs.

EVANSVILLE VANDERBURGH SCHOOL CORPORATION, et al.,

*Defendants-Appellees.*

*Appeal from* the United States District Court for the Southern District of Indiana, Evansville Division (EV 71 C 81)

Before SWYGERT, Chief Judge, CUMMINGS, Circuit Judge, and PELL, Circuit Judge.

The Plaintiffs, who are parents of White children attending predominatly White schools, filed their application for injunction in a state court in Vanderburgh County, Indiana, later removed to the United States District Court for the Southern District of Indiana to enjoin the Defendant School Corporation and its Board of Trustees from implementing a school desegregation plan to become effective in September, 1972, providing in part for the reassignment and transporting (busing) of some White and Negro children in four (4) elementary grade schools in the Defendant School Corporation, and the closing of three inadequate schools, one attended by only 108 children and the other two attended by predominatly Negro children, and consequent reassigning and transporting (busing) of children from those and other schools, in both cases to achieve a better educational opportunity for the school children involved and to insure that these schools will become racially mixed with the percentage of Negroes not greater than 30%.

The hearing on Plaintiffs' request for temporary injunction was combined with the hearing on the merits, with the consent of the parties, and the Court entered its Order following a one-day trial, denying the application for injunction.

The Court below found it did not have to determine whether the Defendant School Corporation operated a de jure or de facto school system, since the School Board had the right to take steps to lessen racial imbalance in the schools, regardless of whether it could be forced to do so, to remove any "vestiges of state-imposed segregation". **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1, 15 (1971).

The Court below correctly relied on the **Swann** case, supra, in upholding the right of the School Board to adopt a desegration plan. The **Swann** case reaffirms the constitutional right of the Defendant School Board to take these steps to lessen segregation in its schools, as follows:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a consitutional violation, however, that would not be within the authority of a federal court. **Swann**, 402 U.S. at 16."

Prior decisions of this Court have also upheld the legality of voluntary desegregation of school children and teachers as well, as a proper exercise of discretion by a school board. **Banks v. Muncie Community Schools**, 433 F.2d 292, (7th Cir. 1970); **Burns v. Board of School Commissioners of the City of Indianapolis**, 437 F2d 1143 (7th Cir. 1971).

Furthermore, lessening segregation in the public schools is specifically authorized by Indiana statutes. Indiana Code of 1971, §20-8-6-2. Burns Indiana Statutes, Ann., §28-6107, provides that: "Such [school] officials may take any affirmative actions that are reasonable, feasible and practical, to effect greater integration and to reduce or prevent segregation or separation of races in public schools, from whatever cause. Such actions may include, but not necessarily be limited to,. . .revision of school districts . . .or enrollment policies to implement equalization of educational opportunity for all".

Plaintiffs' position is without merit, and the decision of the Trial Court is hereby affirmed without oral argument, pursuant to Circuit Rule 22.

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF INDIANA
## EVANSVILLE DIVISION

| | | |
|---|---|---|
| EMIL F. ADAMS, et al.,<br>*Plaintiffs-Appellants,* | ) | *Appeal from* the United States District Court for the Southern District of Indiana, Evansville Division (EV 71 C 81) |
| vs. | ) | |
| EVANSVILLE VANDERBURGH SCHOOL CORPORATION, et al.,<br>*Defendants-Appellees.* | ) | |

### MEMORANDUM OF DECISION

This action was filed December 6, 1971, in the Circuit Court of Vanderburgh County, Indiana, by certain taxpayers and residents of the Evansville-Vanderburgh School Corporation, an Indiana public school corporation (the "Defendant School Corporation"), and by their children attending schools operated by the Defendant School Corporation applying (1) for an injunction to enjoin the School Corporation applying (1) for an injunction to enjoin the school corporation and the members of its Board of School Trustees, its governing body, (the "Defendant Board"), from implementing a Plan of Desegregation and Reorganization (the "Plan") adopted by the Defendant Board on November 17, 1971, and (2) for an order declaring the Plan void.

This action was removed to the United States District Court for the Southern District of Indiana, Evansville Division, on December 21, 1971, and a motion for remand of the action was overruled on February 10, 1972.

Pursuant to order of this Court, a hearing on Plaintiffs' request for temporary injunction was held at Evansville, Indiana, on Thursday, February 24, 1972. At the conclusion of the hearing, the parties stipulated that the trial of the action on the merits should be advanced and consolidated with this hearing on the request for a temporary injunction, and the Court ordered such advancement and consolidation.

The Court has considered the testimony and exhibits taken in evidence at the hearing, the trial memorandum of the Defendants, the post-trial arguments of counsel, and now files its its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

## I

## General

This is an action asserting rights of the Plaintiffs under the equal protection clause of the 14th Amendment to the United States Consitution which prohibits any state from denying any person within its jurisdiction the equal protection of the laws and under Article 1, Section 23, and Article 8, Section 1 of the Indiana Constitution forbidding the "Indiana General Assembly from granting any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," and requiring it to provide for "a general and uniform system of Common Schools * * * * * equally open to all."

The Court has jurisdiction of the federal claims under Title 28 United States Code, §§ 1343(3) and (4), and Title 42 United States Code § 1983. The state and federal claims derive from a common nucleus of operative fact and are such as Plaintiffs would ordinarily expect to try in one judicial proceeding. The federal issue is substantial. The Court has jurisdiction of all the issues raised in this action. U.M.W. v. Gibbs, 383 U.S. 715.

1. The Defendant School Corporation operates all the public elementary and secondary schools in Vanderburgh County, Indiana, consisting of five (5) high schools in grades 9-12, and thirty-seven (37) elementary schools in grades K-6 or

K-8, three (3) of which will, under the Plan, be closed for the 1972-73 school year.

2. Plaintiffs are of the white or Caucasian race and the Plaintiffs, who are students, attend Columbia, Delaware, Baker and West Terrace elementary shcools now operated by the Defendant School Corporation. Plaintiffs bring this action on behalf of themselves and all white students who will or could be transferred from the school which they now attend or could or will be affected under the Plan by a change in the racial makeup of the schools which they attend.

3. The Plan in substance provides for:

(a) Exchange of students between Lincoln, Baker, Columbia and Delaware elementary schools.

(b) Closing of Armstrong, Stanley Hall and Wheeler elementary schools, and the assignment of the students now attending these schools to other schools operated by the Defendant School Corporation.

(c) A reassignment of certain students now attending the Howard Roosa elementary school.

4. Details implementing the Plan have not been approved by the Defendant Board, but have been prepared by its administrative staff and submitted on February 17, 1972, to the Defendant Board for approval. Under such proposal the percentage of Negro students attending each of the elementary schools of the Defendant School Corporation for the three (3) school years preceding the implementation of the Plan and the projected number of Negro students attending the Defendant School Corporation's elementary schools after the implementation of the Plan is as follows:

| Elementary Schools | 1969-70 Grades K-6 or 8 | 1970-71 Grades K-6 or 8 | 1971-72 Grades K-6 or 8 | *1972-73 (Projected Grades 1-8) | *1972-73 (Projected Grades K-8 where difference between Grades 1-8 and K-8 is significant) |
|---|---|---|---|---|---|
| Armstrong | 0 | 0 | 0 | Abandoned | |
| Baker | 8.68 | 7.74 | 6.7 | 29.8 | 26.5 |
| Caze | 0 | 0 | 0 | 6.5 | |
| Cedar Hall | 19.8 | 16.73 | 18.34 | 22.2 | |
| Columbia | .47 | .48 | .81 | 29.5 | 27.0 |
| Culber | 14.7 | 20.00 | 20.45 | 17.5 | |
| Cynthia Heights | .7 | .45 | .39 | .4 | |
| Daniel Wertz | 2.4 | 1.85 | 1.88 | 2.1 | |
| Delaware | 11.9 | 10.39 | 11.72 | 30.5 | 26.8 |
| Dexter | 1.51 | 3.28 | 6.12 | 3.3 | 4.9 |
| Evans | 0 | 0 | 0 | 6.4 | |
| Fairlawn | 0 | 0 | 0 | 4.9 | |
| Fulton | 4.6 | 4.0 | 5.83 | 4.4 | |
| Glenwood | 24.7 | 23.25 | 24.51 | 28.3 | |
| Harper | 3.9 | 5.95 | 6.19 | 3.2 | 5.7 |
| Harwood | 1.4 | 1.36 | 1.18 | 4.2 | |
| Hebron | 4.01 | 4.11 | 5.06 | 4.9 | |
| Helfrich Park | 1.5 | 1.02 | .81 | 9.0 | |
| Highland | 0 | 0 | .15 | 5.9 | |
| Howard Roosa | 31.1 | 37.9 | 38.63 | 18.5 | |
| Lincoln | 99.4 | 99.83 | 99.82 | 29.5 | 36.9 |
| Lodge | 1.7 | 1.68 | 1.65 | 5.5 | |
| McGary | 2.4 | .92 | .68 | 6.8 | |
| Oak Hill | 0 | .10 | .25 | .3 | |
| Perry Heights | 0 | .85 | .80 | 9.3 | 11.0 |
| Plaza Park | 0 | 0 | 0 | 5.9 | |
| Scott | 0 | 0 | 0 | 0 | |
| Stanley Hall | 48.4 | 51.27 | 59.94 | Abandoned | |
| Stockwell | Not opened | Not opened | 0 | 20.1 | |
| Stringtown | 0 | .23 | 0 | 6.2 | |
| Tekoppel | .13 | .14 | 0 | 9.0 9.1 | 9.1 |
| Thompkins | Not opened | Not opened | .66 | 4.9 | |
| Vogel | 1.2 | 10.8 | .63 | 5.3 | |
| Washington | 1.8 | 3.06 | 4.17 | 5.1 | 5.8 |
| West Terrace | 0 | .39 | .50 | 9.4 | |
| Wheeler | 74.9 | 79.19 | 76.04 | Abandoned | |
| White | 8.5 | 6.84 | 13.66 | 12.6 | |

* The columns assume implementation of November 17, 1971 Plan and exclude special education children and those effected by the voluntary transfer plan. They further assume that kindergarten students will attend the closest schools with adequate to excellent facilities.

5. The primary purpose of the exchange of students between Lincoln, Baker, Columbia and Delaware schools is to reduce the percentage of Negro students attending Lincoln School. Wheeler and Stanley Hall schools are being closed because they are antiquated and educationally insufficient, and Armstrong school, because of its size, is inefficient. Wheeler and Stanley Hall schools are two (2) of the five (5) schools which have been recommended for closing by an Advisory Committee to Evaluate Inner-city Elementary School Buildings appointed by the Defendant Board. These two (2) schools were chosen for immediate closing under the Plan since they had a high percentage of Negro students, and all three (3) schools are to be closed since there had been a decrease in enrollment in the Defendant School Corporation and an excess of fifty (50) elementary classrooms with the opening of two (2) new schools, Stockwell and Thompson, within the last two (2) years. The assignments of the students attending Stanley Hall and Wheeler schools are to be made insofar as possible so that the students will attend elementary schools in the same districts as the high schools they will be attending and to achieve a greater distribution of Negroes among the Defendant School Corporation's elementary schools.

6. The Plan provides for reassigning and transporting both white and Negro children. All the elements of the Plan are made to provide more equal educational opportunities for the students in the schools in which changes in attendance areas are to be made, to eliminate elementary schools at which there is a predominately Negro enrollment. The total net savings to the Defendant School Corporation by the closing of Wheeler, Stanley Hall and Armstrong schools is $60,000 annually, taking into consideration the transportation necessitated by the Plan and its implementation.

7. The changes contemplated by the Plan, including in particular the change in racial balance in the Defendant School Corporation's elementary schools, are valid objectives from an educational standpoint. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1.

8. This Court finds it unnecessary to a disposition of this

action, and does not make, any finding as to whether Defendant School Corporation retains any vestiges of a de jure segregated school system.

9. None of the following constitute a violation of Plaintiffs' rights or of the class they represent under either the Constitution of the United States or the Indiana Constitution: (1) the adoption of the plan; (2) the proposed implementation of the Plan; (3) the transfer of white or Negro students as proposed in the implementation of the Plan; (4) the closing of Armstrong, Wheeler and Stanley Hall elementary schools; (5) the transportation of white students or Negro students to effect a more even percentage distribution of Negro students in the elementary schools of the Defendant School Corporation; or (6) the change in the racial makeup of any school to effect a more even distribution of Negro students in the elementary schools of the School Corporation. Any school closing or transfers to effect the above are, insofar as Plaintiffs are concerned, or the class they represent, within the discretion of the Defendant Board in carrying out its duties in administering the educational affairs of the Defendant School Corporation.

## II.

## Order of the Court

It is hereby ORDERED that the application of the Plaintiffs under the United States Constitution or under the Indiana Constitution to enjoin the Defendant School Corporation or the Defendant Board from implementing the Plan, from closing Armstrong, Wheeler and Stanley Hall schools, and from transferring or assigning white or black students to effect a more even percentage distribution of Negro students in the school corporation's elementary schools, and the application of Plaintiffs to declare the Plan void, are hereby denied.

It is finally ORDERED AND ADJUDGED and the Plaintiffs pay the costs of this action.

Entered this 13th day of March, 1972, as per oral findings and order of February 24, 1972.

S. Hugh Dillin, Judge

**28-6106. Equal educational opportunities – Segregation in schools and colleges prohibited.** It is hereby declared to be the public policy of the state of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex; to provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color, or national origin; to reaffirm the principles of our Bill of Rights, civil rights and our Constitution and to provide for the state of Indiana and its citizens a uniform democratic system of common and public school education; and to abolish, eliminate and prohibit segregated and separate schools or school districts on the basis of race, creed or color; and to eliminate and prohibit segregation, separation and discrimination on the basis of race, color or creed in the public kindergartens, common schools, public schools, colleges and universities of the state. [Acts 1949, ch. 186, § 1, p. 603.]

Prior Burns': § 28-5156.

**Title of Act.** The title of Acts 1949, ch. 186, reads: "An act establishing a public policy in public education and abolishing and prohibiting separate schools organized on the basis of race, color or creed, and prohibiting racial or creed segregation, separation or discrimination in public schools, colleges and universities in the state of Indiana and prohibiting discrimination in the transportation of public school pupils and students." In force September 10, 1949.

**Cross-Reference.** The elementary and high schools of the state shall be open to all children until they complete the course of study, § 28-6105.